Filed 4/25/12 P. v. Huber CA3

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. BILLY MELVIN HUBER, Defendant and Appellant.	C067255 (Super. Ct. No. LF012224A)

Defendant Billy Melvin Huber appeals the sentence imposed by the trial court following entry of his pleas of no contest. He claims that because he never admitted the strike allegation utilized by the trial court to enhance his sentence, the sentence on the prior strike must be vacated.

The People contend that defendant's pleas were the product of judicial plea bargaining.

We agree with the People and must therefore conclude the trial court exceeded its jurisdiction. We further conclude that the sentence the court intended to impose was not legally authorized.

Accordingly, we reverse and remand for further proceedings with directions to the trial court to vacate defendant's pleas, vacate the sentence and reinstate all charges and allegations in the information.

FACTUAL AND PROCEDURAL BACKGROUND

The information charged defendant with nine counts related to three separate incidents involving three different victims.

As to Victim 1, defendant was charged with the following offenses, which were alleged to have occurred on September 9, 2010: count 1 -- first degree residential burglary (Pen. Code, §§ 459-461);[1] count 2 -- obtaining money by false pretenses, a misdemeanor (§ 532, subd. (a)); and count 3 -- theft from an elder or dependent adult, a misdemeanor (§ 368, subd. (d)).

As to Victim 2, defendant was charged with the following offenses, which were alleged to have occurred on August 24, 2010: count 4 -- petty theft with a prior theft-related conviction (§ 666); count 5 -- inflicting injury on an elder adult (§ 368, subd. (b));[2] and count 6 -- obtaining money by false pretenses, a misdemeanor (§ 532, subd. (a)).

---

[1] Undesignated statutory references are to the Penal Code.

[2] Defendant's conduct as described by Victim 2 at the preliminary hearing did not involve violence and no injuries

As to Victim 3, defendant was charged with the following offenses, which were also alleged to have occurred on August 24, 2010: count 7 -- petty theft with a prior theft-related conviction (§ 666); count 8 - theft from an elder or dependent adult, a misdemeanor (§ 368, subd. (d)); and count 9 -- obtaining money by false pretenses, a misdemeanor (§ 532, subd. (a)).

In connection with the felonies charged in counts 1, 4 and 7, the information also alleged that defendant had three prior serious felony (strike) convictions within the meaning of sections 1170.12, subdivision (b) and 667, subdivision (d). All three were convictions of first degree burglary (§ 459), one occurring on December 3, 1987, and the other two occurring on July 9, 1993.

A full recitation of the facts underlying each of the charges is not necessary. In summary, on three separate occasions defendant "scammed" three elderly women by telling them they had a problem with something underneath their car and then charging them for a fake part to fix the nonexistent problem.

---

were inflicted. As we discuss later, before striking the strike allegations, the trial court observed that defendant had not committed a violent act during the charged offenses. Thus, evidence at the preliminary hearing supports a factual basis for a charge of section 368, subdivision (d), theft from an elder or dependent adult, but not subdivision (b), inflicting injury on an elder or dependent adult. It appears that subdivision (b) may have been charged in error.

Victim 1 was the victim of the first degree burglary charged in count 1. Defendant followed Victim 1 to her house where he obtained money from her for a fake auto part. Defendant asked her for her name and address to send her a card. Victim 1 went inside her house and defendant followed her inside, where she wrote out the information he had requested. Thereafter, they went back outside to her car. Defendant asked Victim 1 to get inside her car so he could check something underneath. Defendant then went back toward the patio, ostensibly to get a rag. He told Victim 1 to wait in her car, and he was gone for several minutes. Victim 1 could not see where he went from her vantage point. Thereafter, defendant left. At some point after defendant left, Victim 1 noticed that her ATM card had been removed from her wallet, which she had taken out of her purse and set on the dryer in the house. Next to the wallet was a bottle of water Victim 1 had earlier provided defendant. An unauthorized withdrawal was made from Victim 1's account that same day.

Prior to the preliminary hearing, the prosecution offered defendant a plea deal that included a sentence of 14 years in state prison. That offer was not accepted and was thereafter revoked. On January 4, 2011, the day jury selection was scheduled to begin, defendant entered no contest pleas and was sentenced by the trial court to 13 years four months.

Of necessity, we set forth most of the colloquy that occurred on the day before the plea and on the following day when defendant pled and was sentenced.[3]

The matter was assigned for trial on January 3, 2011. The following occurred:

"THE COURT: [¶] . . . [¶] Mr. Huber, we just had earlier ordered up the jurors to start tomorrow afternoon selecting the jury in your matter here, and I want to tell you something. If the jury convicts you -- and I have no opinion and I wouldn't exert it if I did whether they would or would not -- I haven't heard the facts, but I'm just saying if they convict you, you're

---

[3] Based on our review of the plea transcript and the respondent's brief, it appeared that the parties had not provided us with transcripts for all relevant hearings. Accordingly, on January 25, 2012, on our own motion, we sent the trial court a request to augment the record and requested that the augmentation be filed and served by February 15, 2012. In our request, we directed the trial court to provide the following: "1. All reporter's transcripts heard before the Honorable Duane Martin on January 3, 2011. [¶] 2. All reporter's transcripts for proceedings heard before the Honorable Duane Martin on January 4, 2011, with the sole exception of the reporter's transcript attached and made part of this order." The first request was for the proceedings that took place on the day the case was assigned to the trial court for trial. The latter request was intended to cover transcripts of any proceedings conducted on January 4, 2011 other than transcripts of the plea and sentencing the parties had already provided. We attached the transcript of the plea and sentencing to be clear that we desired only other proceedings that might have occurred on January 4, 2011. We received a transcript for the proceedings on January 3, but no additional transcript was provided for January 4, 2011.

looking at 25-to-life. It would be your third strike. [¶] Do you understand that?

"THE DEFENDANT: (Nods in the affirmative)

"THE COURT: [¶] . . . [¶] I've talked to counsel and apparently before the preliminary hearing, there was an offer at one time of 14 years if you want to plead on -- basically taking the six years on the first-degree burglary, doubling it, giving you the double amount of time on a third [*sic*] strike in there, and you're picking up from the other counts is enough to make it 14 years. [¶] Normally, once you . . . reject it and it goes to preliminary hearing, victims have to testify, all offers are off the board. [¶] . . . [¶] Now, I do not do plea bargaining after the preliminary hearing. I have met with counsel, and based on what they indicated to me, even though you have these burglaries from the past, the same basically . . . MO's . . . -- as to the new one -- that if you wanted to still plead for the 14 years, you pled [*sic*] to the sheet, and [the prosecutor] is not participating as an offer because she made her offer and the victims understood what she said was an offer, it was only before the preliminary hearing. But . . . I think that my evaluation of the case is that I would give you the 14 years still. But after that jury comes out, I'm not going to tinker with it. It becomes a third strike and it's 25-to-life. [¶] So you have to make a decision. . . ."

After discussion regarding defendant's credit eligibility, the following occurred:

"[THE PROSECUTOR]: And the other thing that I wanted to clarify is we have discussed this in chambers quite a bit and based on the facts that the People have presented to the Court and based on the facts of the prior strikes, which is the 1987 and 1993 facts, that the Court would have a difficult time after trial striking those strikes and making the necessary findings on the record. Therefore, the Court's hands would also be tied pretty much after the jury trial, even if the jury only came back with one felony; is that correct?

"THE COURT: It's pretty much correct. That's why I indicated . . . that once it goes to the jury and they come back with a first-degree burglary, . . . that's where it's going to be the third strike, that's 25-to-life. They make the call. Your strikes are there."

Defense counsel started to mention that the jury might only convict defendant of petty theft with a prior theft-related conviction and not residential burglary. The following then occurred:

"THE COURT: . . . Frankly, if all they came up with a [*sic*] petty theft with a prior, I probably wouldn't do 25-to-life . . . . *But I guarantee you, though, with a* [*section*] *459, burglary, that I wouldn't tinker with that.* And I'm not guaranteeing I'm going to tinker with the other either. I would say I would look -- if I'm -- I would evaluate in a way that I think that there's a -- it's more favorable that I could do something with it on petty theft only with a prior, but I

wouldn't do anything with it on a [section] 459." (Italics added.)

"[THE PROSECUTOR]: And the Court hasn't heard all of the facts of the case.

"THE COURT: Absolutely not.

"[THE PROSECUTOR]: So you're not really in a situation to determine how severe the [section] 666's are, or either even the [section] 459; correct?

"THE COURT: No. All I'm saying is, from what I know, if a plea was entered . . . on the sheet as such, I would be inclined to follow the 14 years . . . based on what has been presented to me. I have not heard the facts nor has a jury heard the facts. *If the jury comes back with* [*section*] *459 first-degree, I would say there would be no -- there would be nothing to talk about. I would impose the 25-to-life for sure.* [¶] If the jury came back with – other than [section] 459, I would look at it carefully, and that's all I'm saying. But *if they come back with a* [section] 459, *there's really not much to look at*." (Italics added.)

The court suggested that defendant converse with his attorney. Before recessing, the court told defendant, "And one thing I want you to understand . . . . I'm not trying to tell you what you should do. I'm telling you what the options are here, because, remember, we got a jury called if that's what you want, to start at 1:30."

After a recess, defense counsel informed the court that defendant wanted more time to think about the resolution. The matter was adjourned to the following morning.

On January 4, 2011, the trial court commenced the proceedings as follows:

"THE COURT: Now, Mr. Huber [defendant], *my understanding is that you have decided that you would take what had been offered at the pre-preliminary hearing of 14 years*, which equates out -- we've talked about yesterday -- like 11 years 2 months, and you already have -- I don't know how much credit toward the sentence. But is that correct or incorrect?" (Italics added.)

"THE DEFENDANT: Yeah. Correct.

"THE COURT: Okay. [¶] Now, I want you to understand something here. What we're doing is that we have a jury that's here this afternoon ready, willing to go. So you have the right to the jury. They're called. [¶] Do you understand that?

"THE DEFENDANT: Yeah.

"THE COURT: Okay. Now, *if you resolve it today, I will be having -- I will strike a strike because if you got two strikes already, this would be the third.* Okay. But if I strike a strike, then it will be your second one. That's where you get the double that comes up to the 14 years. [¶] Do you understand that?" (Italics added.)

"THE DEFENDANT: Yeah.

"[THE PROSECUTOR]: Your Honor, I'm sorry. You have to strike two strikes. He has one strike in 1987 and he has two separate strikes in '93, so you would be required to strike two.

"THE COURT: *Same result*, but I'm going to strike two of your strikes. [¶] Do you understand that?" (Italics added.)

"THE DEFENDANT: Yeah.

"THE COURT: For purposes of sentencing -- now this is something you have got to realize, too, because sometimes you may misinterpret -- I'm not striking those prior two strikes, two of them, off the board. They're there if you come back on a new offense sometime. All I'm doing is striking them for purpose [*sic*] of sentencing on the plea. [¶] Do you understand the difference?

"THE DEFENDANT: Yeah."

The court then explained to defendant his constitutional rights, the potential penalties, and the consequences of waiving his rights and entering a plea. Having obtained affirmative responses from defendant, the court continued:

"THE COURT: Now, is [there] anything we have not covered on -- prior to the plea being entered?

"[THE PROSECUTOR]: I don't believe so.

"THE COURT: *Now, we're talking about the plea to Count I, right*?" (Italics added.)

"[THE PROSECUTOR]: The Court is taking it away from the People so it is --

"THE COURT: What?

"[THE PROSECUTOR]: The Court is not including the People in this resolution, so I believe that the defendant is required to plead to at least all of the counts listed on the complaint.[4]

"THE COURT: Yeah.

"[DEFENSE COUNSEL]: Okay. [¶] Also, Your Honor, I think the Court should state a reason on the record, the lack of violence.

"THE COURT: I will get that -- we get to that part, but I just wanted to make sure we get to what we're pleading to and I get -- I jumped beyond what I was saying, what we were saying and that is this is one -- and I'll say it again for the record -- that I jumped beyond, as I said yesterday. [¶] Once we have a post-preliminary hearing situation, that is, once it went to the preliminary hearing, all plea bargaining ends. The Court cannot plea bargain . . . nor can the party. [¶] Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Now, that's what the District Attorney is talking about is that their plea offer of 14 years was before

---

[4] As will be seen, the prosecutor and court refer to the charging document as the "complaint" through most of the proceedings. Based on the pleas the court ultimately took from defendant, it appears that initially the court was working from the original complaint and then from the first amended complaint, rather than from the counts and allegations charged in the information. Between the two complaints and the information, only the first three counts and the strike allegations are the same. The other charges and special allegations are different.

the preliminary hearing. They're not offering it now. [¶] *The Court is saying that my evaluation, not a plea bargain one or the other thing*, what I've heard on the record -- let me say what it is that comes to that conclusion, why might be -- the sentence would be 14 years as I indicated. [¶] One, that you have a record of *two strikes* but they're not recent strikes. One is 1987 and one 1993. And that's pretty -- the latest one is about 30 years -- '87 is 30 [*sic*] years ago. Those are your two strikes, first-degree burglary. [¶] Secondly, out of your history in the past and the present -- a factual basis we'll get to -- and the present, there are no allegations, no convictions, and no information that would indicate you have ever had a violent crime in your past. And that there was no violence in this case as has been represented to me and that is important to what you did here. [¶] When I look at the *Romero*[5] -- *Romero* is a case that's a California Supreme court [case] that says a Trial Court can strike a strike or strikes if it finds -- this is the 'if' -- if it finds that when the people passed the initiative, the three strikes initiative, that I find that a 25-year-to-life sentence would be outside the framework of the people based upon this situation *and your resolution of the case. And I will find that based upon what I said. Resolving this case.* Victims are not testifying again. And that on the history, I said, I would *give you what I felt is valid* [*sic*]

---

[5] *People* v. *Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

evaluation of the case. Not trying to bargain with anybody. [¶] Do you understand that?" (Italics added.)

"THE DEFENDANT: Yes, sir.

"THE COURT: Okay. Now, which would mean you would -- *I cannot bargain and say you plead to one, I dismiss the other.* [¶] What I'm going to do is *you're going to plead to the sheet*, but *the sentence total is still going to be 14 years, my evaluation, and I am going to strike two of your strikes for the Romero reasons I just previously stated* for purposes of sentencing in this case and this case only. [¶] Now, do you understand that?" (Italics added.)

"THE DEFENDANT: Yes. Yes."

Based upon the parties' stipulation that the preliminary hearing transcript contained a factual basis for defendant's pleas, the court found a factual basis, took defendant's no contest pleas as to counts 1, 2 and 3,[6] and then continued:

"THE COURT: And the Court has already had the factual basis given to it prior to this being set here today to accept this plea. It's the bases [*sic*] where I came to was understanding how *Romero* would apply and how the Court could impose the 14[-]year sentence even though it's post-preliminary hearing, and based upon the fact of how I view it, and I said previously. [¶] So I'm going to accept the factual basis and

---

[6] Here, the court must have been looking at the original complaint. It only contained three counts, all involving Victim 1.

accept the plea to the counts, *three counts*. There's an intelligent, knowing waiver of the rights with the full understanding of the consequences thereof. And there's an intelligent waiver of those rights in open court." (Italics added.)

"[THE PROSECUTOR]: Your Honor, I'm sorry to interrupt you but there is more -- there are more counts on the complaint.

"THE COURT: I thought so.

"[THE PROSECUTOR]: There's two other --

"THE COURT: Let me go back.

"[THE PROSECUTOR]: -- victims that were listed.

"THE COURT: I'm looking at the amended -- first amended complaint. You're right. [¶] I stopped at page two and we have to go back. I did get Count III.[7]

"[THE PROSECUTOR]: Yes.

"THE COURT: But I missed Count IV, which is [section] 666, petty theft with a prior theft. And that takes three priors, and they allege here three priors. [¶] It alleges that on or about September 15th, that you committed -- of last year -- a

---

[7] Here, it is evident the court turned to the first amended complaint, not the information. In addition to the original counts 1, 2, and 3, the first amended complaint charged petty theft with a prior theft-related conviction in counts 4 and 5 and two prior prison term allegations. The petty theft with a prior theft-related conviction charges were alleged to have occurred on September 15, 2010 and August 25, 2010 in this document. The information alleged petty theft with a prior theft-related conviction in counts 4 and 7, both occurring on August 24, 2010.

petty theft with a prior in that you did commit a theft, money, that qualified under [section] 666. And the three priors that you have from there is that you had a petty theft with a prior on January 22nd, '01. That's out of Stanislaus County. And you had a prior -- that's a prior prison [term]. That's a prior petty theft on August 25th, a felony, in Stanislaus County, January 21st. [¶] And I only see -- is that two?

"[THE PROSECUTOR]: Actually the [section] 459s, which are strikes, would also count as [section] 666s.

"THE COURT: And I didn't get your pleas on those so let me -- I stopped at Count III. *So the sentence is going to be the same*, but the counts are going to be -- they have to be -- plead to the sheet because the District Attorney is not participating because it's not a plea bargain resolution." (Italics added.)

The court took defendant's no contest pleas as to what the court thought were counts 4 and 5, and continued:

"THE COURT: And then I think that's it. [¶] We have the prior prison terms as such.[8] I'm going to -- trying to think if I have to set them out and not following them -- I'm going to -- because I'm going to -- strike the two strikes. *I don't think*

---

[8] The only charging document alleging prior prison term allegations is the first amended complaint. The two prior prison term allegations in that charging document each appear to have alleged the same conviction and prison commitment. Each allegation lists a conviction for petty theft with a prior theft-related conviction occurring on January 22, 2001. Both allegations bore the same case number. There are no prior prison term allegations in the information.

there's any reason to set them on the record because I'm not going to use them as a basis for an enhancement. [¶] Okay. [¶] And I'm going to find -- on those additional pleas -- that it was freely and voluntarily made as the prior ones, and intelligent and knowing waiver of rights as set forth in open court. [¶] Now with that in mind, [defense counsel], does [defendant] wish to waive referral to probation and then judgment imposed at this time?" (Italics added.)

"[DEFENSE COUNSEL]: Yes.

"THE COURT: What I'm going to do is I'm going to -- Count I, the 459, residential burglary, which is a strike, I'm going to -- and I'm going to -- there's two prior strikes. I'm going to waive -- double I have to have one prior strike. So you had three. I'm going to strike two of them. And the reason I'm striking them under *Romero* that I've already gone over, and so there's going to be one other prior strike[]. Let me pick the date of it -- that I will not be striking and that will be the [section] 459 burglary, December 3rd strike that -- I'll take the latest. The July 9th, 1993, burglary out of Stanislaus County, first-degree burglary. That is a basis for the prior strike. [¶] And I'm going to sentence you under Count I in this case, [section] 459, first-degree burglary, on September the 9th of last year, and I'm going to sentence you to the upper term of six years. I'm going to double it because of the strike. That makes it 12 years. *And then we're going to have one year on the two petty thefts with a prior which makes the 14 years; correct or incorrect*?" (Italics added.)

"[DEFENSE COUNSEL]: It would have to be a year on each [section] 666 to get to the 14, yes.

"THE COURT: Is that correct?

"[THE PROSECUTOR]: That is correct. [¶] Actually, you know, I don't think it -- it would have to be one-third the mid.

"THE COURT: It does have to be one-third the mid.

"[THE PROSECUTOR]: So unfortunately I don't have it with me.[9] [¶] Did you get a copy of the -- did the Court write what the strikes offer was? I think it was initially the upper term [of] six years, doubled, 12 years. And then it was one-third the mid. I couldn't --

"[DEFENSE COUNSEL]: So one-third the mid would be an additional 16 months.

"[THE PROSECUTOR]: No. It's two years. I don't know what they picked. I could go get the file.

"THE COURT: Yeah. We need to do it -- *I've got to add up to the 14*." (Italics added.)

"[THE PROSECUTOR]: Yeah.

"THE COURT: *I'm adding up and I'm not coming there*. I'm doubling the --" (Italics added.)

"[THE PROSECUTOR]: No. Yeah.

"THE COURT: -- which makes it 12. [¶] And I got to do one on consecutive sentence -- that's going to be one-third of

---

[9] From the context, it seems apparent that the prosecutor was referencing the prosecution's case file notes on the pre-preliminary hearing offer and sentencing calculations.

the midterm which would be on those -- two -- or felonies which would be eight months on each one. So there's 16 months.

"[THE PROSECUTOR]: No. It was --

"THE COURT: That gives us the 12, 13, 6.

"[THE PROSECUTOR]: I know for a fact it was 14 years even. [¶] Can we go off the record for a minute?"

After an unreported discussion, the following took place:

"THE COURT: [Defense counsel] will explain in a moment to you. I didn't have you admit the two prior -- prison prior terms.[10] I said they are not going to add anything, but they will benefit you in a sense. I'm going to -- one year each one to get to 14 without giving you any odd months. [¶] Do you understand?

"THE DEFENDANT: Yes.

"THE COURT: Okay. Let's go back to the present term and they come out of the prior strikes, prior serious felony, serious felony -- serious felony. [¶] I don't see any of the prison terms alleged prior because you got all the prior felonies, but not Count I -- off the record."

After an unreported discussion, the following transpired:

"THE COURT: Back on the record. [Defense counsel.]

"[DEFENSE COUNSEL]: Yes, Judge.

---

[10] No prior prison term allegations were alleged in the information. They were only alleged in the first amended complaint. (See fn. 8, *ante*.)

"THE COURT: The serious felonies are alleged prior prison terms rather. What I'm going to do is *he's going to gain four months out of this* because I'm going to take the -- one of the petty thefts with a prior, [section] 666, and I'm going to double it, 16, and -- which will make it 16 months. And it will make the -- it will be 13 years, 6 months, if I added correctly. [¶] Is that correct? [¶] Everybody agree?

"[DEFENSE COUNSEL]: We would agree with that, Your Honor.

"THE COURT: [¶] . . . [¶] Okay. [¶] I'm going to do the following. [¶] I'm going to sentence you, Mr. Huber, based upon what you entered the plea on and what I indicated to you was my evaluation of the case, pled to the sheet, it's going to be the upper term, first-degree burglary, and that's six years. Because of its -- we have one strike left, I'm going to double it to 12 years. [¶] I'm going to take Count IV, the [section] 666, petty theft with a prior felony, and I'm going to make that consecutive to Count I, the 12 years, that would be the midterm of the [section] 666, eight months, double it, 16 months, for a total of 13 years 6 months.

"[DEFENSE COUNSEL]: If you double it, it's 16, that would be -- wouldn't it be 13 years 4 months?"

"[THE PROSECUTOR]: It is.

"THE COURT: Yes, it is. I'm giving you more.

"[THE PROSECUTOR]: I'm not liking this deal more and more all the time. It's fine.

"THE COURT: Round it off. *You gain eight months without doing anything*. [¶] Okay. [¶] Now you have credit."

Thereafter, there was discussion about defendant's credits, the court awarded credits and then ordered defendant transported to the Department of Corrections and Rehabilitation. Then the court and the prosecutor engaged in the following colloquy:

"[THE PROSECUTOR]: Can I make just a few clarifications because it was really confusing?

"THE COURT: You may.

"[THE PROSECUTOR]: Okay. [¶] Just for the record, the defendant had three prior strikes, one in '87 for [section] 459 first degree, and two separate ones in 1993 for each [section] 459. [¶] The Court -- the defendant admitted one of those strikes, which was July 9th of 1993, and the Court, under *Romero*, struck the other two strikes.

"THE COURT: Correct.

"[THE PROSECUTOR]: And then the defendant pled to all the counts contained in the Information --

"THE COURT: Correct.

"[THE PROSECUTOR]: -- that is within the Court's file. [¶] This was -- *the People were not involved in any plea negotiations* because our offer of 14 years was the strike offer made prior to prelim. When prelim was held, that offer was revoked. So this was -- this -- *the pleas that were taken by the Court were done without the participation of the People of the State of California.*" (Italics added.)

"THE COURT: *That is correct*." (Italics added.)

"[THE PROSECUTOR]: Okay.

"THE COURT: What's on the prior -- so we have an understanding -- no misunderstanding -- that I struck under *Romero*, serious felony, I struck the 1987, December 3rd, Stanislaus County, first-degree burglary. And I struck another one out of Stanislaus County the same date, July 9, 1993. And I did not strike the last July 9, 1993, serious felony strike out of Stanislaus County. And that is, one, because of this strike, the first-degree burglary, I doubled. [¶] Okay?

"[THE PROSECUTOR]: Okay. Thank you, Your Honor.

"THE COURT: I hope we got it."

The court reporter's transcript shows that defendant never actually admitted the strike prior that doubled his sentence, and he never entered a plea to counts 6 through 9 charged in the information.

Defendant filed a timely notice of appeal. The trial court denied his request for a certificate of probable cause. Thereafter, defendant filed a second timely notice of appeal.

DISCUSSION

Defendant contends that because he never admitted the prior strike used by the trial court to enhance his sentence, the sentence enhancement must be vacated and he should be resentenced without the enhancement. The People argue the plea arrangement was the product of a "judicially imposed plea bargain" the prosecution did not approve of or participate in and, as such, the pleas should be vacated, the information reinstated and the matter reversed and remanded for further proceedings. A court that engages in judicial plea bargaining

without the consent of the prosecution acts in contravention of statute and thus, acts in excess of its jurisdiction. (*People v. Turner* (2004) 34 Cal.4th 406, 418; *People v. Labora* (2010) 190 Cal.App.4th 907, 913, 914 (*Labora*); see §§ 1192.5 & 1192.7.) Thus, the People may raise this issue in response to defendant's appeal.

We conclude that defendant's pleas were the product of judicial plea bargaining. We also note that his pleas and sentence were flawed because the court's indicated sentence violated sections 667, subdivision (c)(6) and 1170.12, subdivision (a)(6), which make consecutive sentences mandatory for a strike defendant if the current offenses were not committed on the same occasion and did not arise from the same set of operative facts.

A. The Law Prohibiting Judicial Plea Bargaining

The origin of the prohibition against judicial plea bargaining is found in *People v. Orin* (1975) 13 Cal.3d 937 (*Orin*). In *Orin*, our high court said: "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by

prosecutorial consent to the imposition of such clement punishment (§ 1192.5),[11] by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citations], or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition

---

11 Section 1192.5 provides in pertinent part:

"Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, . . . the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

"Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.

"If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

"If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available. . . ."

precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of 'bargaining' between the adverse parties to the case -- the People represented by the prosecutor on one side, the defendant represented by his counsel on the other -- which bargaining results in an agreement between them. [Citation.]" (*Orin*, *supra*, 13 Cal.3d at pp. 942-943.)

As the People correctly point out, this court was faced with circumstances similar to the present case in *People v. Woosley* (2010) 184 Cal.App.4th 1136 (*Woosley*). Over the prosecution's objection, the trial court in *Woosley* accepted defendant's pleas of no contest to all of the charges and his admission to an on-bail enhancement. The pleas and admission were conditioned on defendant receiving probation and a two-year eight-month suspended prison sentence, with the understanding that the defendant could withdraw his pleas and admission if, after reviewing a probation report, the court decided it could not sentence the defendant as indicated. (*Woosley*, *supra*, 184 Cal.App.4th at pp. 1140–1141.) After reviewing the probation report, the court determined that probation was inappropriate. Thereafter, the defendant entered a second conditional guilty plea to all of the charged offenses and the on-bail enhancement, conditioned on receiving a prison term of two years eight months, again over the prosecution's objection. (*Woosley*, *supra*, 184 Cal.App.4th at p. 1142.) Part of the handwritten portion of defendant's plea form read, "'if the court refuses to accept the above-stated *agreement*, I will be

allowed to withdraw my plea.'" (*Ibid.*, italics added.) The matter was set for sentencing. (*Ibid.*) During the sentencing hearing, at which the prosecutor repeated his objection, the trial court and defense counsel discussed how to calculate the sentence to achieve an aggregate sentence of two years eight months. The trial court asked defense counsel, "how would the enhancement fit within the two years, eight months?" Defense counsel explained that the court would have to dismiss the on-bail enhancement allegation pursuant to section 1385, identifying the defendant's youth and lack of felony convictions as an adult as justification. (*Id.* at pp. 1143-1144.) Thereafter, the court imposed the sentence it had indicated after striking the enhancement. As reflected in the court's minutes, the reasons for striking the enhancement were "Age of Def." and "Prior Record." (*Id.* at p. 1144.)

On appeal, this court held "[t]he trial court stepped into the role of the prosecutor when it induced defendant to plead guilty in exchange for a commitment to dismiss the on-bail enhancement to reach the agreed-upon sentence." (*Woosley, supra,* 184 Cal.App.4th at pp. 1144-1145.) In arriving at this conclusion, this court discussed the distinction between judicial plea bargaining, which is prohibited, and sentencing pursuant to an indicated sentence, which is not. "Some trial courts want to encourage resolution of criminal cases without the prosecutor's consent, and employ what has come to be known as the 'indicated sentence.' 'In an indicated sentence, a defendant admits all charges, including any special allegations

and the trial court informs the defendant what sentence will be imposed. No "bargaining" is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]' [Citations.] In such cases, the trial court 'may indicate to [the] defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent right to challenge the factual predicate and to argue that the court's intended sentence is wrong.' [Citation.] An '"indicated sentence" . . . falls within the "boundaries of the court's inherent sentencing powers."' [Citation.] [¶] . . . 'When giving an "indicated sentence," the trial court simply informs a defendant "what sentence [the court] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." [Citations.] An accused retains the right to reject the proposed sentence and go to trial. The sentencing court may withdraw from the "indicated sentence" if the factual predicate thereof is disproved.' [Citations]" (*Id.* at p. 1146.)[12]

---

[12] We agree with what is well-settled law defining what has come to be known as an indicated sentence, including the defendant's ability to withdraw his or her plea if the trial court later determines the indicated sentence is inappropriate. (See *People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261, 1264-1265 (*Ramos*); *People v. Brown* (1986) 177 Cal.App.3d 537, 551-552, fn. 17; *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 276.) A defendant who enters a plea pursuant to a negotiated agreement with the prosecution is permitted to withdraw his or her plea if the court later determines the agreed sentence is inappropriate. (§ 1192.5, 3d & 4th par.; see

This court went on to conclude that the trial court did not act pursuant to a valid indicated sentence. "[T]he trial court gave what appeared to be an indicated sentence. But that sentence could be imposed only if the trial court dismissed the on-bail enhancement. Therefore, it was more than just an indicated sentence; it included, anticipatorily, the dismissal of the on-bail enhancement. [¶] Even though section 1385 gives the trial court discretion to dismiss 'an action' in the interests of justice, the anticipatory commitment by the court to exercise that discretion to dismiss the enhancement cannot be used to negate the role of the prosecutor." (*Woosley, supra,* 184 Cal.App.4th at p. 1147.) Rejecting the defendant's contention that his plea was the product of a valid indicated sentence, this court went on to explain that the "defendant's characterization ignores the reality that the plea did not expose [the defendant] to punishment for the on-bail enhancement because the trial court had promised to dismiss it. The form of the bargain was to have defendant admit the on-bail enhancement in anticipation of the trial court 'exercising' its discretion to dismiss the enhancement, but the substance of the bargain was no different from the trial court dismissing the on-bail enhancement before taking the plea. Therefore, the bargain could be made only with the prosecutor's consent." (*Woosley, supra,* at p. 1147.)

---

fn. 11, *ante*.) The situation should be no different when the court, after further consideration, decides it cannot impose an indicated sentence.

In *Labora*, the trial court engaged in judicial plea bargaining. The trial court had initially indicated a sentence of six years eight months. Defense counsel later asked the court to impose a concurrent sentence on the count for which the court indicated the possibility of an eight-month consecutive sentence. The court agreed to do so and indicated a sentence of six years. (*Labora*, *supra*, 190 Cal.App.4th at pp. 910-911.) The appellate court reasoned that the trial court's initial indication was a valid indicated sentence. "'"[T]he trial court simply inform[ed] defendant 'what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.' [Citations.]"'" (*Id.* at p. 915.) However, there was nothing in the record that showed the trial court changed its indicated sentence on further evaluation of the facts. Yet, defendant obtained an assurance from the trial court that it would impose eight months less than the court originally had indicated it might impose. Defendant's sentence, therefore, was the product of judicial plea bargaining. (*Id.* at pp. 915-916.)

B. The Law Permitting Indicated Sentences

We contrast the judicial plea bargaining cases against cases in which the trial courts were held to have given valid indicated sentences. However, we first note observations made by our high court in *Orin* not mentioned in the judicial plea bargaining cases. "[S]entencing discretion wisely and properly exercised should not capitulate to rigid prosecutorial policies manifesting an obstructionist position toward all plea

bargaining irrespective of the circumstances of the individual case. As the calendars of trial courts become increasingly congested, the automatic refusal of prosecutors to consider plea bargaining as a viable alternative to a lengthy trial may militate against the efficient administration of justice, impose unnecessary costs upon taxpayers, and subject defendants to the harassment and trauma of avoidable trials. [Citation.] A court may alleviate this burden placed upon our criminal justice system if this can be accomplished by means of a permissible exercise of judicial sentencing discretion in an appropriate case." (*Orin*, *supra*, 13 Cal.3d at p. 949.)

Following *Orin*, the court in *Felmann* approved the practice of indicated sentences. The defendant in *Felmann* was charged with four counts of grand theft and four counts of forgery charged as felonies. Defense counsel asked the trial court to entertain a plea of no contest to the charges conditioned upon a grant of probation, no jail time, restitution, and a fine. Defendant specified that, if after reviewing the probation report the court was not inclined to impose sentence in the terms outlined, the nolo contendere plea could be withdrawn and the matter proceed to trial. Defendant's counsel described his understanding of the prosecution's evidence, the defendant's prior record and the defendant's current job, family and health circumstances. (*Felmann, supra,* 59 Cal.App.3d at p. 273.) The prosecution objected to the proposed disposition, contending that section 1192.5 requires the prosecution's consent. The court took the plea, and after reviewing a probation report,

sentenced defendant as the defendant's counsel had outlined. (*Id.* at p. 274.)

The Court of Appeal reasoned that "the exercise of sentencing power cannot be made subject to the consent of the district attorney because the requirement of that consent is an injection of the executive into the province of the judicial branch of government." *(Felmann, supra*, 59 Cal.App.3d at p. 275.) Accordingly, the court held, "a [trial] court may indicate to a defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent right to challenge the factual predicate and to argue that the court's intended sentence is wrong. If the prosecutor's argument does not persuade and if the facts as developed are as assumed for the purpose of indicating the sentence, that sentence may then be imposed. If not, then defendant has the option of going to trial or accepting harsher treatment on a guilty or nolo contendere plea." (*Id.* at p. 276.) Citing *Orin*, the court held that "any construction of Penal Code section 1192.5 which requires prosecutorial consent to the permissible scope of judicial power in sentencing . . . is an unconstitutional invasion by the executive of power reserved to the judicial branch." (*Id.* at pp. 276-277.)[13]

---

[13] Because the record in *Felmann* was not clear as to whether the trial court proceeded on the defendant's conditional plea of no contest solely in the exercise of its sentencing discretion or whether the court accepted an offer of the defendant to enter

Similarly, the court in *People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261 (*Ramos*) approved the practice of indicated sentences for defendants who plead guilty or no contest to all charges and allegations in the charging document. (*Id.* at pp. 1268-1270.) There, the trial judge in each of the cases involved in the appeal "thoroughly familiarized himself with the nature of the offense and the offender and indicated what an appropriate disposition would be, with or without a trial." (*Ramos*, *supra*, at p. 1265; see *id.* at pp. 1264-1265.) The trial court's review included a review of the preliminary hearing transcripts. (*Id.* at pp. 1265, 1266-1267.)

The Court of Appeal observed, "absent a strict prohibition on the giving of an 'indicated sentence,' there is a strong public policy in California favoring settlement as the primary means of resolving criminal cases." (*Ramos*, *supra*, 235 Cal.App.3d at p. 1268.) "[A]t a time when both fiscal and judicial resources are in short supply, needless time-consuming trials are to be discouraged. 'A trial is a search for the truth. [Citations.]' [Citation.] This goal is achieved when a defendant is willing to plead guilty as charged and admit each and every special allegation. Wasteful expenditures of time, money and personnel detract from the

---

his plea in return for more lenient treatment than he otherwise would have received, the Court of Appeal issued the writ and directed the trial court to rehear and reconsider the defendant's conditional plea and to accept it only if to do so involved no consideration of more lenient treatment *solely because of the plea*. (*Felmann*, *supra*, 59 Cal.App.3d at pp. 277-278, italics added.)

cases which truly require trial. 'Indicated sentences' result in sure convictions for the People precluding the possibility of whole or partial acquittals, foreclose or at least substantially curtail appeals and the delays associated therewith, and allow the trial court to impose swift and fair punishment." (*Id.* at p. 1269.)

In *People v. Vessell* (1995) 36 Cal.App.4th 285 (*Vessell*), the defendant was charged with willful infliction of corporal injury as a felony. (§ 273.5, subd. (a).) He was also charged with a strike allegation and a prior prison commitment allegation. (*Vessell*, *supra*, at p. 288.) The trial court indicated it would reduce the charge to a misdemeanor pursuant to section 17, subdivision (b)(1), if defendant entered a no contest or guilty plea. (*Vessell*, *supra*, 36 Cal.App.4th at pp. 288, 296.) Defendant pled no contest and admitted the truth of the prior conviction. Thereafter, the trial court reduced the conviction to a misdemeanor and sentenced defendant accordingly, nullifying the effect of the strike and prison prior. (*Id.* at p. 288.)

The People appealed, contending the trial court's indication that it would reduce the charge to a misdemeanor constituted judicial plea bargaining. (*Vessell*, *supra*, 36 Cal.App.4th at p. 296.) Rejecting that contention, the Court of Appeal noted there was no requirement the People consent to the plea where a defendant pleads guilty to all charges and all that remains is the pronouncement of judgment and sentencing. (*Ibid.*) "In that situation, the trial court may give an

'indicated sentence' which falls within the 'boundaries of the court's inherent sentencing powers.' [Citation.]" (*Ibid.*) Because the record showed that the court gave an indicated sentence and the defendant entered into an open plea, the court concluded that the trial court "properly exercised its sentencing discretion and did not participate in an illegal plea bargain." (*Ibid.*)

C. Analysis

As the foregoing authorities illustrate, to be a valid indicated sentence, the sentence must be one the court would impose irrespective of whether guilt is adjudicated at trial or admitted by plea. The determination of the appropriate sentence is made after the court "thoroughly familiarize[s]" itself "with the nature of the offense and the offender" (*Ramos*, *supra*, 235 Cal.App.3d at p. 1265) and has an understanding of the events underlying the charges and allegations, the applicable sentencing scheme, and the legal calculation required to arrive at the indicated sentence. The record demonstrates that did not happen here.

Here, the trial court sought to resolve the case for the same period of confinement the prosecution had offered defendant for an early resolution prior to the preliminary hearing -- 14 years. By the time of trial, defendant was ready to resolve the case for that sentence. With 14 years in mind, the court indicated it would sentence defendant to that term of imprisonment without apparently reading the preliminary hearing transcript and familiarizing itself with

the charges in the information or the number of strike allegations that would have to be dismissed or what sentences it would need to impose on each count to arrive at a 14-year prison sentence.

When the court was told it would have to strike two strike priors and not one, the court announced, "[s]ame result." Later the court again stated defendant only had two strikes, specifying one in 1987 and one in 1993. The court apparently initially assumed defendant would be pleading only to count 1. After being reminded by the prosecutor that the prosecution was not participating in the disposition and that defendant would have to plead to all the charges in the "complaint," the court told defendant he would have to "plead to the sheet." The court then took pleas to the three charges that were in the original complaint, apparently not fully understanding there were nine counts charged in the information and that those counts involved three victims.

After the prosecutor told the court there were more victims, the court told defendant the sentence would be the same. The court then looked to the first amended complaint and took pleas to counts 4 and 5, two counts of petty theft with a prior theft-related conviction. However, the second petty theft with a prior theft-related conviction was charged in count 7 of the information, not count 5. Noting the two prior prison term enhancements which were alleged only in the first amended complaint, the court indicated it felt no need to address those allegations since it was not going to use them "as a basis for

an enhancement." The court then said it would impose a one-year sentence on each of the petty theft with a prior theft-related conviction charges, apparently without considering the consecutive sentencing rules and the strike implications of those felonies. When told the sentence would have to be one-third the midterm doubled, the court realized for the first time the calculations did not add up to 14 years.

Thereafter, the court indicated defendant would have to admit the two prior prison term allegations, but then changed its mind apparently based on something that was said during the ensuing unreported bench conference. Then, after concluding it could not calculate an aggregate sentence of 14 years, the court indicated it would run only one of the two petty theft with prior theft-related conviction charges consecutively and it would double one-third the midterm on that count. The court initially noted that defendant would "gain four months out of this," but then realized the sentence would actually be eight months less than the 14-year sentence it originally indicated.

This case is similar to *Woosley* in the sense that the court indicated a willingness to strike enhancement allegations to resolve the case after defendant indicated he was willing to accept a specified sentence. Also, as in *Woosley*, the court here needed help on how to calculate the term defendant indicated a willingness to accept. (*Woosley, supra,* 184 Cal.App.4th at pp. 1143-1144.)

This case also bears some similarity to *Labora*. Like the sentence imposed in *Labora*, the court here reduced its original

indicated sentence, apparently to achieve a resolution it knew defendant would accept, without further evaluation of the facts. (*Labora*, *supra*, 190 Cal.App.4th at pp. 910-911.) Defendant received an eight-month discount, in the trial court's words, "without doing anything."

As we have noted, a valid indicated sentence is a sentence that is based on the court's own determination of the appropriate sentence regardless of whether there is a trial. The court must determine the sentence based on an understanding of the facts as presented by counsel and as set forth in the preliminary hearing transcript, the charges and allegations in the charging document, an assessment of the defendant's culpability, and a calculation of the sentence that is consistent with the sentencing rules. That did not happen here.

The record clearly reveals that the indicated term of imprisonment was selected merely because defendant indicated a willingness to accept that sentence, not because the sentence was what the court would have imposed irrespective of whether the case went to trial. Indeed, the day before defendant entered his plea, the court told defendant it would give him the 14-year sentence if he pled prior to trial. At the same time, the court told defendant that if the jury convicted him of first degree burglary, it would not "tinker with" defendant's strikes, "there would be nothing to talk about," and the court would sentence defendant to 25 years to life "for sure."

On the following day, after confirming that defendant was now willing to accept a term consistent with what he had been

previously offered by the prosecution, the court told defendant, "if you resolve it today, I will be having -- I will strike a strike because if you got two strikes already, this would be the third." While the court explained that it found "a 25-year-to-life sentence would be outside the framework of" the three strikes law based on a lack of violence and the age of the strike priors, it added "and your resolution of the case" as a third reason. Courts are not permitted to strike sentencing allegations pursuant to section 1385 for the reason that a defendant expresses a desire to resolve his case. (*People v. Garcia* (1999) 20 Cal.4th 490, 498; *Romero*, *supra*, 13 Cal.4th at p. 531 [a court may not strike a sentencing allegation simply because a defendant pleads guilty].)

We recognize that the trial court said it provided an indicated sentence as the result of its evaluation of the case and that it was not bargaining with defendant. However, the court's words are not determinative for our review (*Ramos*, *supra*, 235 Cal.App.3d at p. 1266, fn. 2, 1267, fn. 3), and we look to the substance of what occurred (see *Woosley*, *supra*, 184 Cal.App.4th at p. 1147). Given the circumstances and other words used by the court, we conclude that what occurred here was judicial plea bargaining.[14]

---

[14] We note the prosecutor never expressly objected to the court's sentence, never requested a probation report or a sentencing hearing, never asked for time to file a statement in aggravation, and in fact, attempted to assist the court in calculating a 14-year sentence. "When the People believe that the court has given an inappropriate 'indicated sentence,' the

We do not mean to suggest that a court should not exercise its discretion to strike sentencing enhancement allegations, including strikes, pursuant to section 1385 in appropriate cases. Unless statutorily prohibited, trial courts have that discretion (*Romero*, *supra*, 13 Cal.4th at p. 504) and should exercise it when appropriate.

The sentence imposed here was flawed for reasons in addition to being the product of judicial plea bargaining. Obviously, the court's failure to obtain an admission on the strike allegation and pleas to counts 6 through 9 are procedural flaws. Defendant did not actually "plead to the sheet." The strike is ineffective and the convictions on counts 6 through 9 are nonexistent.

Even if the strike admission and pleas to the remaining counts had been given by defendant, the court had no authority to sentence defendant to a concurrent sentence on the second petty theft with a prior theft-related conviction charge as a component of its revised indicated sentence. Although not reflected in the reporter's transcript, according to the clerk's minutes and the abstract of judgment, a concurrent 16-month

---

remedy is to persuade the court to withdraw therefrom at the sentencing hearing. The People have the right to file a statement in aggravation (Cal. Rules of Court, rule [4.]437) and present evidence in aggravation. (Cal. Rules of Court, rule [4.]433(c)(1).)" (*Ramos*, *supra*, 235 Cal.App.3d at p. 1270, fn. 4.) Nevertheless, section 1192.5 requires the prosecutor's express acceptance of the plea, and that clearly was not given here.

sentence[15] was imposed for the petty theft with a prior theft-related conviction charge in count 7.[16] This the court could not do. Apart from the fact that concurrent sentences are not expressed as one-third the midterm, sections 667, subdivision (c)(6) and 1170.12, subdivision (a)(6) make consecutive sentences mandatory for a strike defendant if the current offenses were not committed on the same occasion and did not arise from the same set of operative facts. (See *People v. Lawrence* (2000) 24 Cal.4th 219.) The charges in the information involve three victims who were separately victimized at different places on separate occasions. Thus, the court imposed a legally unauthorized sentence to resolve the case.[17]

---

[15] The clerk's minutes read: "AS TO COUNT 7 IMPOSED ONE-THIRD THE MID TERM OF 0 YEARS(S), 16 MONTH(S), 0 DAY(S) CONCURRENT TO COUNT 1. PURSUANT TO PC 1170.12(B)/667(D), TIME IMPOSED IS DOUBLED AS TO COUNT 7." The abstract of judgment does not reflect that a sentence of one-third the midterm was imposed on count 7. Instead, it indicates that a concurrent term of one year four months was imposed.

[16] See footnote 3, *ante*. Because the clerk's minutes reflected that the admission to the strike and pleas to counts 6 through 9 had taken place and the reporter's transcript for the morning session on January 4, 2011 did not, we asked the court to provide us with transcripts of any other proceedings that may have taken place after the morning session at which defendant pled and was sentenced. No additional transcripts reflecting additional proceedings on that day were produced. Consequently, we must conclude that there was no admission to the strike, no pleas to counts 6 through 9, and that the clerk's minutes are erroneous.

[17] We also note that the court's reasons for striking the two strike priors here was not set forth in the minutes as required by section 1385, subdivision (a). "'"[I]f the reasons are not

D. Conclusion

The policies underlying the discretion to provide indicated sentences discussed in *Orin* and *Ramos* obviously continue to be true today. Calendars are increasingly congested and court resources are dwindling. While we appreciate the enormous volume of cases trial courts face and the efforts made by them to adjudicate those cases as expeditiously as possible, in doing so, courts must be ever mindful of the bounds of their jurisdiction and must exercise great care when providing an "indicated sentence" so as not to usurp the function of the People. A court must also ensure that when it provides an indicated sentence, the sentence is one it would impose after trial given the set of facts with which it is presented, and the sentence calculations comport with statutory sentencing rules.

Here, the trial court's attempt to resolve this case short of trial amounted to judicial plea bargaining. The court

---

set forth in the minutes, the order dismissing may not be considered a dismissal under section 1385."'" (*Romero*, *supra*, 13 Cal.4th at p. 532, quoting *Orin*, *supra*, 13 Cal.3d at p. 944; accord, *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516, fn. 3.) "'The statement of reasons is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement. It is not enough that on review the reporter's transcript may show the trial court's motivation; the *minutes* must reflect the reason "so that all may know why this great power was exercised."'" (*Romero, supra,* at p. 531.) A dismissal under section 1385 unaccompanied by reasons set forth in an order entered on the minutes is "'ineffective'" and ordinarily must be vacated in its entirety on an appeal by the People. (*People v. Williams* (1998) 17 Cal.4th 148, 162, 164.) As the People did not appeal here and this error may not be jurisdictional, we only note the trial court's failure to comply with section 1385 for the benefit of the trial court on remand.

exceeded its jurisdiction and the court imposed an unauthorized sentence. We must reverse.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to vacate defendant's pleas and reinstate the information in its entirety, including all three strike allegations.

MURRAY, J.

We concur:

RAYE, P. J.

HOCH, J.